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Case *and* Comment

The Lawyers' Magazine—Established 1894

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The New United States Court of Military Appeals

By GEORGE N. BEAUREGARD
of the Massachusetts Bar

Member of Editorial Staff
The Lawyers Co-operative Publishing Company

AS PART of the new Uniform Code of Military Justice (Act of May 5, 1950, 50 USC (Chap 22) §§ 551–736), Congress has created the United States Court of Military Appeals, an appellate court composed of civilians. This new all-civilian court now assumes the position of top reviewing authority of courts-martial of all the armed services.

The organization, duties, and powers of the Court of Military Appeals are specified in Article 67 of the Code. The court is composed of three judges appointed from civilian life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. Not more than two of the judges may be appointed from the same political party (the present court is composed of two Democrats and one Republican). The terms are staggered so that a new vacancy, commencing on May 1, 1956, will be created every five years. The judges receive a salary of $17,500 per year, and to be eligible for appointment one must be a member of the bar of a Federal court or of the highest court of a state. Once appointed, a judge is eligible for reappointment. The court has authority to prescribe its own rules of procedure and to determine the number of judges required to constitute a quorum.

The Code specifically limits the power of the President to remove judges from the court to the following grounds: neglect of duty, malfeasance in office, and mental or physical disability. And, removal in those cases is predicated upon due notice and hearing. The President does have power to designate a judge of the United States Court of Appeals to fill the office of a judge of the Court of Military Appeals temporarily unable to perform his duties "because of illness or other disability."

The cases which reach the court are classified by the Code into three groups: (1) All cases in which the sentence, as affirmed by a board of review,[1] affects a general or flag officer,

[1] The Judge Advocate General of each of the armed services is authorized to appoint in his office one or more boards of review, each to be composed of not less than three officers or civilians; each member is required to be a member of the bar of a Federal court or the highest court of a state. Prior to the Code, boards of review were composed entirely of officers.

or extends to death; (2) All cases reviewed by a board of review which the Judge Advocate General of the service involved orders forwarded to the Court of Military Appeals for review; and (3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

Under the mandate of (1) supra, any sentence extending to death, as well as a sentence affecting a general officer or a flag officer (the Navy equivalent of a general officer), is automatically reviewed by the Court of Military Appeals. The death sentence is permissible at all times upon conviction of offenses denounced in eight different articles of the Code including rape, premeditated murder, and taking a life while engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson. In addition, if committed in time of war, offenses denounced in five other articles make such a sentence permissible.

How many cases will reach the court under (2) and (3), supra, is for the most part dependent upon the sound discretion of the Judge Advocates General of the various armed services in certifying cases from their boards of review, and of the Court of Military Appeals itself in granting relief to accused persons who petition from board of review action. A large number and wide variety of cases could reach the court from the cases that must be referred to boards of review, which the Code provides will review the record of every court-martial in which the sentence, as approved, affects a general or flag officer, or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more. This in effect provides for board of review consideration of the conviction and the resulting sentence for all but minor offenses.

For example, there are more than 100 offenses the conviction of any one of which may be punished by confinement for more than one year. In addition, there are 27 other offenses which, though not punishable by confinement for one year or more, are punishable by a dishonorable or bad-conduct discharge.

Further, other cases may reach the

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Court of Military Appeals. Where, as a result of a trial before a general court-martial, the sentence is less than any of those enumerated above (e.g., confinement of an enlisted man for only 6 months, or suspension, rather than dismissal, of an officer from rank, command, or duty), such sentence must be "examined" in the office of the Judge Advocate General of the appropriate armed service. If any part of the findings or sentence is found to be unsupported in law, or if the Judge Advocate General so directs, the record is reviewed by a board of review. From this action, these cases may then be forwarded to the Court of Military Appeals if the Judge Advocate General so directs. However, in these cases the accused does not have the right to petition for review before the Court of Military Appeals because of the minor sentences involved.

Thus, in effect, any act of a person subject to the Code which violates the military law of this country may possibly reach the Court of Military Appeals, either by specific mandate of the Code, forwarding action of a Judge Advocate General, or petition of an accused.

In a case where an accused wishes to petition the court from a board of review decision, the Code provides that he has thirty days from the time he is notified of the board's decision in which to do so. It is not stated, however, whether actual notification is necessary before such period commences. The Judge Advocates General of the Army and Air Force, on the question of notification where an accused escaped from confinement before delivery of the board's decision could be made, recently held that the thirty-day period begins to run on the date upon which the accused would have been served with notice had not such been impossible because of his unlawful absence. Under such a rule, an accused's right to petition the Court of Military Appeals, where otherwise existing, will be lost if he is wrongfully absent on the date of attempted notification and for thirty or more days thereafter. Where the accused does file his petition within the prescribed period, the court is required to act upon such petition within the thirty days of its receipt.

Like most appellate courts, the Court of Military Appeals takes action only with respect to matters of law and does not inquire into questions of fact. And the court acts only in regard to the findings and sentence as approved by the officer taking initial action on the case (i.e., the officer who convened the trial court, or court-martial), and as affirmed or set aside as incorrect in law by a board of review. In a case which a Judge Advocate General orders forwarded to the court, action need be taken only with respect to the issues raised by him; in a case reviewed upon petition of an accused, action need be taken only with respect to issues specified in the grant of review.

If the court sets aside the findings and sentence, it may dispose of the case in either one of three ways:

(1) By ordering a rehearing, except that such may not be done where the setting aside is based on lack of sufficient evidence in the record to support the finding;

(2) By ordering the charges dismissed; or

(3) By directing the Judge Advocate General of the service concerned to return the record to the board of review which previously considered the case for further review in accordance with the court's decision.

It should be noted, however, that even if a rehearing is ordered (1), (supra), the convening authority may dismiss the charges if he finds that a rehearing is impracticable.

In cases which it reviews, no sentence can be executed until affirmed by the Court of Military Appeals; furthermore, sentences extending to death or involving a general or flag officer may not be executed until they are approved by the President, and sentences extending to dismissal of an officer, cadet, or midshipman may not be executed until approved by the Secretary of the department concerned.

A duty placed upon the court, which, though not functional in relation to the review of cases, is of considerable importance as being indicative of the Congressional frame of mind when the Code was passed. Many of the Code's provisions were undoubtedly the result of unfavorable public opinion, sometimes of questionable validity, aroused particularly and quite intensely after World War II, concerning the administration of justice in our armed services. Most, if not all, of the valid objections seemingly have been met by Congress in the Code. That there was a sincere effort to right any wrongs then existing, and to provide for the correction of any future deficiencies, is poignantly illustrated by the last duty specified in Article 67 of the Code. It provides that the court and the Judge Advocates General of the armed services are to meet annually to make a comprehensive survey of the operation of the Code; and further, they are to report to the Congressional Committees on Armed Services and to the Secretaries of Defense and other departments, the number and status of pending cases as well as any recommendations relating to uniformity of sentence policies, amendments to the Code, and any other matters deemed appropriate.

The three judges, members of the new Court of Military Appeals who took office on June 20, 1951, come from different geographical areas of our country, and represent a combination of broad training and experience in the law in all its phases, in addition to diversified and extremely extensive experience in military affairs. They are:

Robert E. Quinn, Chief Judge; mem-

ber of the Rhode Island bar since 1917; former (in Rhode Island) Governor, Lieutenant Governor, state senator, and Judge of the Rhode Island Superior Court; active naval duty in World War II as a legal officer; Court of Military Appeals term expires May 1, 1966; Democrat.

George W. Latimer, Judge; member of the Utah bar since 1925; twenty-six years military service with Utah National Guard and the Army of the United States, including combat duty in Pacific theatre, World War II; served four years as Justice of the Utah Supreme Court; Court of Military Appeals term expires May 1, 1961; Republican.

Paul W. Brosman, Judge; member of the Illinois bar since 1924, and the Louisiana bar since 1942; law teaching at Indiana, Mercer, Yale and Tulane Universities; former dean of law school, Tulane University; active military service in World War I and II, including duties as chief, Military Affairs Division, Office of Air Judge Advocate; contributor to legal and other periodicals; Court of Military Appeals term expires May 1, 1956; Democrat.

The current opinions of the Court of Military Appeals are published in "Court-Martial Reports—The Judge Advocates General of the Armed Forces and the United States Court of Military Appeals." This publication also contains the holdings and decisions of the Judge Advocates General of the various services, and their boards of review.

A Technical Compliment?

Profesor Jones of Columbia Law School tells this story about the fellow and girl who had a four-year-old child. They decided (for the benefit of the child's future) to get married. Upon approaching a local lawyer they found that a petition signed by the judge was all that was necessary to complete the nuptial ceremony. The lawyer having drawn the petition, it was presented to the judge. Now this judge was a stickler and asked the girl whether she realized the consequences of her actions. The lawyer said she did, but the judge, not satisfied, asked that she have a talk with him. The lawyer left the courtroom and produced his client, who was questioned by the judge. She stated that she realized the import of her step and was prepared to take it.

"You realize, of course," said the judge, "that the child will still be a technical bastard. . . . You know what that is?"

"Oh yes!" replied the mother, "that's what the lawyer said you are."—Columbia Law School News.

A Country Lawyer Visits the King's Bench

By H. PARKER YORK
of the Lancaster, Missouri Bar

"OYEZ, Oyez, Oyez! All manner of persons having anything to do before His Majesty's Supreme Court of the Bahama Islands, draw near and give your attendance and you shall be heard. God save the King."

As the last of these impressive words droned in a sonorous voice by the black-robed court crier fell on the silence of the courtroom, the mahogany mace with its miniature gold crown of His Majesty, King George VI of England, was placed upright in its stand beside His Lordship, Sir. Guy W. Henderson, Chief Justice of the Supreme Court of the Bahamas. After bowing curtly to those assembled the Chief Justice assumed his place at the "King's bench" and everyone settled expectantly back in the not too comfortable wooden seats. That is, everyone but the smartly uniformed Bahamian constables, who in their white helmets topped with bright gold spikes, white tunics, bright blue and red striped trousers and businesslike sabers strapped at their sides, stood stiffly at attention at each exit and on either side of the prisoner's dock, a wooden cage-like structure, in the center of the room.

To a country lawyer accustomed to the informality of rural procedure, the opening of His Majesty's court was an inspiring and impressive occasion and I could sense that it was likewise impressive to those who belonged there. No man was permitted in the courtroom without coat and tie, although the thermometer stood at 80 degrees, and no woman could remain without a hat or head covering. The lawyers who were to participate in the litigation of the day and the Registrar General, or court clerk, were clad in black robes and gray curled wigs. The Chief Justice himself wore a crimson robe, white winged collar and gray wig. Over him and to the back of the wall was the royal coat of arms resplendent in gold bas-relief. All of this might seem a bit out of place in Pumpkin Center but in Nassau, capital city of these coral isles where Columbus first set foot on the western world, it somehow seemed quite meet and proper and certainly commanded respect, if not awe, from the spectators.

As I watched this drama of common-law procedure unfolding before me the present seemed to fade into the past as if the stream of history were reversing itself and I felt again as I had in

But when they got there,

the cupboard was bare...

(An actual case)

The estate was worth $44,000 . . . the beneficiary, a woman, was an incompetent. So the Probate Court appointed a conservator for the estate whose bond was furnished by a personal surety—a realtor of substance and unquestioned integrity.

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my law school days when we were delving into the history of the great common-law of England from whence we drew our system of modern jurisprudence. I was thinking again of the origin of our courts of equity and how they were at one time presided over by a Chancellor or "Keeper of the King's Conscience." I was thinking of the almost forgotten rule in Shelley's Case and of the odd reference in the old English cases to the court who sat on the "wool sack."

But it was not Lord Coke who was sitting on the "wool sack" but Chief Justice Henderson whom the Crown attorney was respectfully addressing as "My Lord". Judge Henderson was a slender and somewhat gaunt man whose black piercing eyes seemed to look through the object of his attention. He appeared quite stern and cold on the bench, but later, in his chambers, I found him to be a man of great warmth of character and altogether pleasant. He informed me that he was only recently sent from England to the Bahamas to assume the duties as Chief Justice of the Supreme Court which is the highest court in the Colony. Under his court in Nassau is a magistrate court similar to our newly created magistrate courts in Missouri and in the outer islands of the Bahama group are located Commissioners who conduct courts of lesser jurisdiction than the Magistrate. There is no appeal from the Supreme Court other than to the Privy Council in England and such appeals are only allowed when the jury is not unanimous and are seldom taken. The Chief Justice is appointed directly by the Crown for a term of five years and draws approximately 357 pounds per year or $10,000.00 in our money. He also receives some extra compensation as do our circuit judges. The Attorney General or Crown Attorney is also appointed rather than elected.

Here in one of the oldest of Britain's colonies I was observing common-law procedure much as it was practiced in the days of the erudite Blackstone. Here the prisoner in the dock stood during the trial as did each witness as he testified on the stand at the right of the bench. Here each attorney always stood when interrogating a witness or when addressing the court and bowed courteously to the judge as he left or entered the courtroom. Here each witness was solemnly sworn on the Holy Bible by the Registrar General as was the jury in groups of four with their hands on the sacred book. Here the jury was selected from a panel of forty-eight by the Court Crier drawing the numbers from a box of wooden cubes and the prisoner personally indicating whether the venireman called was acceptable or not. The prisoner was entitled to ten peremptory challenges. I was astounded with the rapidity with which the jury was qualified and sworn, a process taking less than ten minutes. Jurymen in the Bahamas receive ten shillings, or $1.40 per day, for their services. Contrary to the multiplicity of objections usually

made by the state and defense attorneys in the U. S. in the trial of a case, the Crown Attorney and counsel for the accused made practically no objections to any evidence introduced. The Chief Justice alone transcribed the evidence in longhand and only such facts as he considered material were made of record. There was no court reporter. The court frequently interrupted to clear up a point and questioned the witness himself. Before each witness was dismissed the Chief Justice asked the foreman of the jury, who had been chosen as soon as the jury was qualified and sworn, if he had any questions. The foreman arose and either questioned the witness or stated he wished to make no further examination.

But here in the Bahamas, even as at home in Missouri, the business of His Majesty's court finally ground to a stop at the close of the day, the Chief Justice departed from the bench and the weary court officers and attendants left for their homes. As I walked out into the semi-tropical twilight past the statue of Queen Victoria beyond the palms in the courtyard the last words of the Court Crier, "God save the King", lingered in my memory. To British subjects the king is the symbol of their system of jurisprudence which we adopted as our birthright from England. Its guiding star has always been the rule of right and wrong in England and in the United States; its immutable principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs.

Good Legal Advice

A lawyer's most difficult job often occurs when he finds that "a judicial saint, a member of the hierarchy, like Holmes, has written a decision which is dead against him." It's pretty hard to know what to do, but you're almost sure to be wrong if you ask the judge to disregard it or overrule it. It is better to give the case its due, but try to show why it is not applicable in your case because this is a different time, a different era, and because this jurisdiction—if it can be shown—has not in the past chosen to follow that particular legal policy.—*Judge Simon A. Rifkind in Columbia Law School News.*

The Southwestern Legal Center—A Laboratory in Law

By GORDON R. CARPENTER

Executive Secretary, The Southwestern Legal Foundation

TO ANYONE who reads his daily newspaper, it becomes increasingly obvious that the battle for justice and reason has not been won. The battle in men's minds, as Dean Clarence E. Manion so aptly terms it, still rages between free peoples and slave peoples. A mighty arsenal is stockpiling in both camps. Its explosion could wreck our civilization.

Even as these mighty forces marshal their strength, here in our United States, the conflict surges. The tug-of-war between capital and labor; the rebirth of crime; the insidious immorality in high public places; the wrestlings between the individual and government control—all point to the continuing battle for law and justice.

Every phase of life is affected by law. Laws give stability and protection to our liberties and our businesses. They give us security. The only road to peace is a road paved by law. The Legal Center is peculiarly adapted to the proper consummation of projects which tend to place the law in its proper social sphere. By utilizing the experience of all branches of the legal profession, of business and of public life, the Legal Center establishes an environment where research and unified action may help resolve some of our perplexing problems.

The Southwestern Legal Center in Dallas, Texas, was the first to be completed and activated in the United States. Its modern brick and stone buildings of Georgian architecture, built on a grant of five acres dedicated by Southern Methodist University to the permanent use of the Legal Center, form a quadrangle facing one of Dallas' most prominent streets. The Legal Center Main Building rises to four stories. In its center is an enclosed stack room on five floor levels which serve its three segregated libraries. In addition to the main students' library, there are libraries in international law and relations, and the law of oil and gas. The building also houses the administrative offices of the Foundation, the SMU Law School, faculty offices and library, a 400-seat auditorium, lounge and seminar rooms.

Lawyers Inn provides two upper floors for law students' dormitory and guest rooms, while the first floor ac-

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commodates a dining room and kitchen, lounge and private dining rooms for faculty and Foundation members.

Florence Hall, remodeled from an existing University building, contains classrooms, practice courtroom, and offices for the free legal aid clinic operated by the Foundation in cooperation with the Law School.

Financing the Legal Center was the task of the Foundation, which subscribed funds from Southwestern lawyers to build the Lawyers Inn; while businessmen contributed the funds for the Legal Center Building. An unusual feature of the campaign was that the oil and gas industry financed the construction of the oil and gas wing of the Main Building.

By contractual agreement with the University, the Foundation sponsored the capital funds drive; while the University donated the land, the classroom building, and will operate and maintain the physical plant.

The Southwestern Legal Foundation is a private Texas corporation, formed in April, 1947, to "support, encourage, and establish scholarships, conduct investigations in legal problems and activities, . . . to cooperate with and make recommendations to recognized bar associations, . . . and other institutions interested in the improvement of the legal profession . . . and administration of justice; to establish and operate legal institutes, legal aid clinics and other related activities for the benefit of the legal profession, the public and government."

The brainchild of a group of outstanding businessmen, leaders of the Bar, and eminent educators from the five Southwestern states and governed by a Board of Trustees representing these three groups, the Foundation is non-sectarian, non-communistic and non-profit. Regional in scope, it seeks goals that are of interest particularly to the Southwestern states.

If law is to assume its proper social sphere, if it is to stay abreast of conditions in our rapidly changing, conflicting world, constant research and study is required.

While research is common in medicine, science, agriculture and engineering, research in law is just beginning. Is such research in law practical? Medical research to relieve human suffering is probably more appealing, but is it not true that if our law enforcement breaks down, the result is anarchy, chaos or dictatorship? There are no defense counsels for justice in a dictatorship.

Realizing this, research is regarded as one of the most important phases of Legal Center activity. Research projects in which it engages and the conclusions reached reflect only mature and impartial investigations and searching analysis. Thoughtful and experienced judges, lawyers, legislators, law school professors, businessmen, representatives of management and labor, and even students work in the quiet and noncontroversial atmosphere of the Legal Center but defend their

work in forums, in the courts, and before the public.

Each expert working in his own field cannot do the job alone. The judge is restrained by precedent; the lawyer preoccupied with work for his client; the schoolteacher limited by not being in close contact with concrete cases. But in each group are men who have been trying to cope with the problems of law and society. Drawn together at the Legal Center, their concentrated effort may well find the solution to many of our perplexing modern-day problems.

In almost every field where the immediate need is felt, research has been or will be undertaken at the Southwestern Legal Center. Since Southwestern lawyers and laymen alike find themselves particularly interested in the law of oil and gas, research and development in this field is being stressed. The Oil and Gas Division of the Foundation has underwritten a $1500 research fellowship to be awarded to a graduate in the SMU School of Law with the stipulation that such a student do the majority of his work and write his thesis in oil and gas law. Other research is expected from graduate students working toward the special degree of Masters in Oil and Gas Law.

The Taxation Division has undertaken a similar fellowship and special master's degrees are conferred. Similar research is planned in other specific fields such as labor law, administrative law, law of insurance, and international law and relations.

The Foundation Trustees have authorized research in problems of Legal Aid, Low Cost Legal Service and Small Claims. Many lawyers complain that they do not have appropriate places to go with their claims of $50.00 or less. The Foundation has begun factual research and will make appropriate findings concerning the administration of justice affecting such small claims. Small research funds have also been established in administrative law and in evidence.

Under the direction of the Honorable Hatton W. Summers, a project has been started into the Fundamental Principles of Law and Government. This venture into the very heart of our democratic tradition is expected to produce thought-provoking results.

Interwoven in all of these research projects is the SMU graduate school of law whose operation is under the close guidance of the Foundation. While working side by side with the SMU Law School in the achievement of many of its goals, the Foundation retains its independent entity.

In action, the Southwestern Legal Foundation employs many forms, depending upon the subject, material and the interested profession or industry. While research is of timely importance, the collected data must be the springboard of action if it is to be of practical use for the attainment of the Legal Center's stated objectives or if it is to be employed in the everyday life of practical business.

It is a necessity that progressive

lawyers continue their education. The hundreds of new court decisions, the thousands of administrative rulings from bureaus and commissions of big government, and our complex business structure all tend to require specialization in law. A convenient program must be afforded the lawyer who would keep up with these latest rulings and changes and to absorb the cumulative research data. The institutes, conferences and seminars to which the Foundation is annually committed offer an excellent outlet for such a program. Experience has shown that the lawyer enjoys going back to school for short and frequent courses under the guidance of experts.

Several annual institutes are held at the Legal Center on subjects of special interest to the Southwest, such as labor law, insurance law, oil and gas law, the law of taxation, administrative law, trial tactics, international law and relations, personal injury litigation and trade regulations. Already more than a thousand attorneys and businessmen have attended these meetings.

A series of oil and gas lectures last Fall attracted more than 100 attorneys for weekly sessions on advanced topics. The annual oil and gas institutes have gained national prominence.

In cooperation with the SMU Law School, a free legal aid bureau is operated at the Legal Center. Hundreds of needy people have been provided with legal services since its inception. Comfortably settled in model law offices and supervised by a faculty advisor, senior law students gain much needed practical experience with live clients. Legal aid is a vital need in every community. The Foundation is proud of this work to date.

Other activities include publishing a series of outstanding books and institute proceedings covering specialized branches of the law, furnishing a site annually for regional moot court competition for law students, and serving as the official distribution center for the United States Department of State of pamphlets and other material. Outstanding specialists in various legal fields are available for speaking appearances before special groups of the Bar and Business. During the spring each year, a full week of lawyers' activities will summarize and spotlight the preceding year's events with specially selected conferences and institutes and nationally recognized speakers.

Less apparent on the surface but vitally important to the future of law is the practical education absorbed by the students of the SMU Law School through their intimate contact with professors, practicing lawyers, businessmen and prominent authorities in specialized fields. Through the activities of the Southwestern Legal Center, the young lawyer emerges from law school better prepared to cope with the practical problems of everyday practice.

The operations and sundry activities of the Southwestern Legal Foundation function around the nucleus of

its officers and Board of Trustees, composed of leading lawyers and businessment of the five Southwestern states of Louisiana, Arkansas, Oklahoma, New Mexico and Texas. Superimposed on these are the Advisory Board; the various divisions and committees which are concerned with specialized aspects and projects; and the more than 400 members of the Foundation, Southwestern lawyers and businessmen who subscribe specified amounts to help carry on the Foundation's work and pay nominal annual dues. The many activities afforded by the Foundation are just compensation for the nominal cost of membership.

Fortunately, the Southwestern Legal Foundation has already translated into positive action many of its stated objectives, taking them out of the realm of mere projection and high-sounding phrases. With the Legal Center plant completed and in full operation, there is no limit to the amount or character of work that can be accomplished. Through the individual and collective results of the many projects the Foundation has in prospect, it is hoped that the improvement of the administration of justice may be greatly advanced.

AMERICAN BAR ASSOCIATION SECTION

The publishers of Case and Comment donate this space to the American Bar Association to permit it to bring to our readers matters which the Association deems to be of interest and practical help to the general practitioner.

THE press headlines heralding the accomplishments of the A.B.A.'s 1952 Mid-Winter Meeting focused public attention on the House of Delegates proceedings, which considered and acted upon a wide range of resolutions and reports prepared and submitted by the various committees and sections.

Much attention centered about the resolution, adopted after stirring debate, which recommended that Congress consider an amendment to the United States Constitution, in respect of the treaty-making power, as follows: "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty."

A resolution was also adopted to the effect that no action shall be taken at the present time "with reference to the establishment of an International Criminal Court," and opposition to a possible U. S. ratification of the U. N.'s News Gathering Convention was declared.

Continuing the A.B.A.'s continuing attack upon Communism, action was taken expressing approval of "the manner in which the investigations and hearings by the present Committee on Un-American Activities of the House of Representatives are now being conducted," and commending this Committee "for its continuing inquiry into the activities of the Communist Party, its members and followers, in order to establish a basis for appropriate legislation." A resolution was also approved which provided that "the American Bar Association lends its moral support and encouragement to any person now or heretofore a member of the Communist Party or who in any wise embraced the doctrines of Marxism-Leninism and who is now desirous of coming forth and testifying under oath in order to expose its conspiratorial aims and purposes."

Another highlight of the 1952 Mid-Winter Meeting was the adoption of a resolution calling for special planks in the respective platforms of the two major political parties designed to help the Federal judiciary, commending "the policy of the Judiciary Committee of the United States Senate . . . irrespective of party affiliation, of re-

questing and considering a report and recommendation by the Judiciary Committee of the American Bar Association" on nominees for judicial positions, and pledging "that only the best qualified persons available shall be selected for appointment to judicial office . . ."

There was also unanimous recommendation of three resolutions of the A.B.A. Committee on Organized Crime designed to bring the forces of the organized Bar into action against attorneys who, as public officials or in private practice, "foster organized crime, engage in unethical practices, attempt to bring undue or improper influence on public officials or become party to any action or activity which would bring law into disrespect or disrepute upon the bench or bar."

And much attention centered on the adoption of a resolution which proposed to limit the Federal Income tax to 25 per cent, or a maximum of 40 per cent, except during certain wartime conditions, and to leave all estate taxation to the states.

The greatest bulk of the Mid-Winter Meeting's accomplishments, however, went unnoticed in the press. These included, among others, a resolution condemning the telecasting and broadcasting of legislative and judicial hearings, the organization of the first national conference to promote Lawyer Referral Services, great progress in the field of public relations, and the "bread-and-butter" work of the meeting following the significant proposals of the Patent, Trade-Mark and Copyright Section, the Public Utility Law Section, the Admiralty and Maritime Law Committee, the Commerce Committee, and many other A.B.A. Committees and Sections, to change and better the laws relating to their fields of special study.

At the meeting's end, the State Delegates nominated one of the nation's most outstanding attorneys—Robert G. Storey—for the A.B.A. presidency. A member of the A.B.A. Board of Governors, Dean Storey is presently Dean of Southern Methodist University Law School and president of the Southwestern Legal Center, as well as a distinguished leader of the Texas Bar.

Nonlegal Definitions

Censor: a fellow who knows more than he thinks you ought to.—Healthways.

Egotist: A guy who thinks he's smarter than you—but you know he isn't.—Wall Street Journal.

H-bomb: destruction in the large economy size.—Healthways.

Pedestrian: a person who has his rights, the last ones.—Outdoor Indiana.

Philanthropist: a person who gives his money to grateful strangers so relatives won't have to argue about it.—Round-Up.

Woman driver: a person who drives the same way a man does—only she gets blamed for it.—Passing Variety.

"All These Books Should Be Burned"

By HON. JACK POPE
Associate Justice, Texas Court of Civil Appeals

Condensed from a speech dedicating the new Bexar County, Texas, Law Library

"ALL THESE books should be burned." That was the remark one of my friends made one day when he walked into a room and saw my lawbooks lining the walls. I agreed with him, provided we could agree on which body of the law we should destroy first. He would not consent to the destruction of the Constitution, nor the criminal laws, nor the laws of personal injury, nor those relating to our highway, air and rail transportation; nor the laws of corporations; nor the anti-trust laws; nor the pure food laws; nor the commercial law, nor the laws of real property. In fact I could find no particular law he was ready to burn . . . just the laws. He was an educated man, a staunch American; but somewhere down the line his education had failed to teach him that our government exists only by reason of law; that the alternative is the ever-dangerous government of man. There are few lawbooks in those governments.

By taking his suggestion I did spend a few minutes time trying to arrive at some central purpose of the law, which if it could be stated as a postulate, might serve as a generalization sufficient to dispense with the specific. I thought that perhaps we could commence by saying that the object of the law is to adjust certain relations. These relations may be classified as (1) relations between individuals, (2) relations between individuals and the government, and (3) relations between the states and the federal government. The necessity to adjust relations is to keep one from mistreating the other. That means that one should treat another as he wants to be treated himself. Law is really an enforced Golden Rule, so we will take that as our general rule, and discard the rest. When we do this, one may wonder why Christ did not speak those words and stop, but He preached sermon after sermon, lesson after lesson, taught parable after parable. Those who are apt at saying that we should limit our laws to the Ten Commandments or the Golden Rule close their eyes to all the rest of the law detailed immediately following those pronouncements.

But to get on, we have now discarded all the law except the Golden Rule, and that has required us to discard many of the books of the Bible too, for they are surplusage for the

same reason that the other body of law is surplusage. But what is the Golden Rule? It takes up a little space, too. It contains twenty-six words in the King James version and, actually reduced to a word, it means Love. But Love is more than a word on a page, and back of it, Platonic fashion, is the idea of love, which is the only reality. So now we have succeeded in simplifying to that extent of eliminating it from a page entirely.

This is of course absurd, but no more absurd than the general myth that complex matters should be simple. The addition of each new fact to that extent complicates what was at first rudimentary. Higher mathematics serves great uses, but it is certainly not simple, for it concerns the use of many complex principles, each built upon the other. It was never intended that man should limit his mind to simple matters. If that were so we would stop with the first reader. We would be content in our understanding that the world is square, and business would be transacted only with the man next door, if he had a door. We would have no commerce between cities, for the additional factors of credit, trust, commercial paper, banks and transportation would be complicating factors.

I don't think that the architect should be limited to one room houses because it would be simpler, nor that office buildings should be one story jobs so that plumbers and electricians won't have to think. I don't really think the schools should have only one subject, nor that the city should have only one park. I am glad that Christ taught many parables; and that He had twelve apostles rather than one. I don't believe in one election. I don't want our cooks to keep their cuisine simple, Chinese-like, and serve us rice three times a day. I like more than one comic strip, a variety of editorials, and several newspapers.

I don't know anything about music, but I am not one of those who thinks that we should have just one good song. A simple mind can grasp a simple song. The Star Spangled Banner is far from a simple piece of music, judged by my unskilled standards, but I do not think it should be discarded. The greater the idea, and the sweeter the music, the greater is the necessity for a complex arrangement not only of the music, but of the orchestra.

Perhaps one day some naked savage clapped his hands together with joy. It pleased him and so he did it again. He attracted the attention of his neighbors, and they began to clap their hands together and soon the whole village joined in. They had united rhythm with sound, and music in its simplest form was born. Much later queer little marks were put on parchment over words to show whether to go up or down in chanting. A man decided to draw a straight horizontal line in order to fix the pitch. Another line was drawn and then another—then two more. Finally there were five lines,

and we still have that complicated system.

Another man contrived a mark for a pause or rest, another fixed upon a scale; still another added sharps. And another decided that one group would hold long notes while others went on singing, and part singing was invented. The standard of music has improved from the mad clapping in the jungle, by the addition of each new complicating fact. That is the story of music in a nutshell, from the jungle to the "singing commercial", and it shows how progress is an accumulation of elements which tend to make complex that which was simple.

In a museum in one of the western states I saw a complete kit used by an ancient medicine man. It had been discovered in a well-preserved condition. All of its contents had been analyzed and displayed in the museum. There was a piece of bark, a stone fetish, a piece of cord, a mask, some berries. There were some twenty-seven articles in all. That was the medical knowledge of that race of people. They did not have our modern libraries of books about nerves, and blood, and cancer, and the hundreds of other branches our medicine men study today.

There is one thing that we can say for that extinct civilization. It had the beauty of a simple life. It had eliminated the complex. Its people had found the secret of reducing their learning to simple terms. Of course their tribe is now extinct. But for this coincidence, they might have taught us their secret.

Whether it is mathematics, music, medicine, or law, human learning is preserved through the invention of books. In whatever field a new idea is developed with a new impact on society, it must have its new counterpart in the law. When society becomes static, law too will become static, and I hope that day never arrives.

It is the law library that keeps the channels of trade open. It is the law library that determines most disputes before they ever reach the courthouse. It is the law library that houses our documents of freedom that enjoy a direct lineage still traceable to their sources through the Declaration of Independence, the Declaration of Rights, the Petition of Right, the Magna Carta, the Laws of Edward. This genealogy is one of the many threads that we may follow through the lawbooks. I am not ready to destroy those genealogies. We need to know the steps upon which our system has climbed.

Truth comes from the use of all available materials. A sifting process can eliminate the immaterial, but the more concentrated the thought upon a subject, the more piercing and extended that concentration, the greater are the probabilities that more light and truth will be detected and described for your and my use in the search for Justice. And I am pleased that those thoughts are now being collected for

our mutual use in our joint efforts to administer Justice under the law.

And so I join in adding my appreciation for the development of this library. I hope that this work will continue and that this library will grow. The finest treatises, encyclopedias, digests, journals, and reports are already there. Others should from time to time be added. Those are the tools used in the discovery of Justice. I hope that time will also find works on sociology and society included in the library. I hope that specialized subjects will not be disregarded and that the text writers will be included.

We live in strange times when values are not always properly understood. No pep squads cheer the addition of books to a library, and yet, when the story is finally told it will be the libraries of our nations—not its stadiums—which have preserved our national greatness.

The Tapestry of Freedom

It may seem dingy and frayed aroung the edges, but the curtain on the voting booth is the priceless tapestry of freedom.—*Cincinnati Enquirer.*

How Far Back Can You Trace A Title?

Some years ago Eastern interests considered the purchase of some real estate in Louisiana. When the abstract title came through, their attorney called attention to the fact that the title record ran back only to 1803, and communicated with the owners as to the record prior to that date.

In part, this is the answer he received:

"I note your comment upon the fact that the record of title sent you as applying to the lands under consideration dates only from the year 1803, and your request for an extension of the record prior to that date.

"Please be advised the government of the United States acquired the territory of Louisiana, including the tract to which your inquiry applies, by purchase, from the government of France, in the year 1803.

"The government of France acquired title by conquest from the government of Spain.

"The government of Spain acquired title by discovery of one Christopher Columbus, traveler and explorer, a resident of Genoa, Italy, who, by agreement concerning the acquisition of title to any lands discovered, traveled and explored under the sponsorship and patronage of Her Majesty, the Queen of Spain.

"The Queen of Spain had verified her arrangement and received sanction of her title by consent of the Pope, resident of Rome, Italy, and ex-officio representative and vice-regent on earth of Jesus Christ.

"Jesus Christ was the son and heir-apparent of God.

"God made Louisiana.

"Trusting that this additional citation complies with your request and assuring you of our willingness to be of service, I am . . ."

—From the Mountaineer Grower,
Official Organ of the West Virginia
Horticultural Society

Should a Lawyer's Office Be a Dead Storage Warehouse?

By JACOB V. SCHAETZEL
of the Denver, Colorado Bar

Reprinted from Dicta, January, 1952

OFFICE space costs as much as $2.25 or more per square foot in large cities, and with expanding business every foot of space in a lawyer's office counts. Should we not give our clients their files when we are through with their cases?

Our office now has a record of 9,250 cases handled under this system during the past 12 years, and we have never regretted our move to return all files to the clients when their cases are completed. Here is how it works:

We have a large 5″x8″ white card with a record of the case on it. It contains such data as Court number (if there is one), name of client and who referred the client to us, work to be done, estimated fee, estimated time required, and then the final fee that was actually charged and collected, and the total number of hours consumed. A review of these cards from time to time will tell us how much per hour we were able to charge our clients and thus assist us in determining future fees to be charged in like cases. This card has sufficient space to record things we are doing for the client. When our work is completed, we make a note on the card as to the disposition made of the case and then deliver the entire file to the client after taking his receipt. We itemize the important documents such as deeds, releases, abstracts, etc., and then generally add a statement, "together with complete contents on file." This file includes all correspondence connected with the case. Any papers that we think we should keep, such as closing sheets on real estate transactions, receipts for abstracts, etc., are fastened permanently to this white card. All cards bear a file number and the cards are then placed in our permanent file. Any information on possible will contests is retained by us. Under this system if a client calls us and wants to know where his papers or abstracts of title are, we can immediately turn to our index and then look at the white card and tell him what disposition was made of these papers.

We believe it to be much better for a client to have his own papers than to leave them in his lawyer's office. Lawyers die, retire, move or go into military or government service, and it then becomes a serious problem as to what to do with their old files.

Many lawyers who go into govern-

ment service leave papers in their attics, basements, or in the attics of some of our office buildings, and when somebody wants their papers, it is difficult to find them. In fact, some of them never are found.

A lawyer is not paid for storing old files and the only reasons I ever heard as to why he should do it was the fact that it brought the business back to the office. If the work we do for our clients won't bring them back, they won't come anyway and it is rather embarrassing to have an attorney come in with a letter from the former client asking for the delivery of the papers to him. Another reason I have heard is that the lawyer might be liable for some of his acts unless it could be explained by some of the letters in the file. Under modern practice, we can compel the client to produce these letters should occasion arise because they have receipted for the entire file and should the papers not show up upon proper showing to the Court, we could give oral testimony as to their contents. In our 12 years of returning the files to the clients, we have had no occasion to regret our procedure. When our files are all active, papers properly filed and indexed, it only takes a few moments time to report the status of a case to our client. We don't have to take time out to look through old files to satisfy the curiosity of clients as to whether a certain thing was or was not said years before. I have never known a client to tender a fee for the many hours spent in searching files. We tell the clients to file certain papers in the bottom of their trunks, others to go in their safety boxes, and still others we leave discretionary with them as to whether they will or will not be destroyed. Another nice result that happens is that the clients will look through the file and for the first time realize the large amount of work and correspondence which their case necessitated, and some are frank enough to admit that the fee charged was more than reasonable. Yes, we find that it does not pay to be a dead storage warehouse for our clients' old files.

Dying for His Conviction?

Professor Michael of the Columbia Law School recently told the following story:

A prisoner, just convicted of murder in the first degree, listened stoically as the Judge sentenced him to death in the electric chair.

"Have you anything to say for yourself?" the Judge asked the defendant.

"Why, yes, Your Honor, there is something that I would like to say. I am glad to die for something I believe in."

"What!" exclaimed the Judge in stunned amazement. "What is it that you believe in that you are glad to die for?"

"Capital punishment," replied the defendant.—*Columbia Law School News.*

"The Egg and I"

By HON. PETER F. HAGAN
Judge, Court of Common Pleas No. 1, Philadelphia, Pa.

Reprinted from Pennsylvania Bar Association Quarterly, October, 1951

I HAVE recently completed that dizzy cycle or period which I call "judicial gestation." It marks that interval of time which elapses between the signing of a judge's commission by the Governor and the primary or general election, when vox populi accepts or rejects the Governor's choice. The length of the period varies, and is dependent upon the closeness of the appointment to the next judicial return day. In my case the period was approximately eleven months—the Governor having laid the egg in August of 1950 and I having been hatched at the primary election held on July 24th last. My lying-in period might have been extended an additional three months, until the November election, had my Democratic opponent been nominated in the primaries.

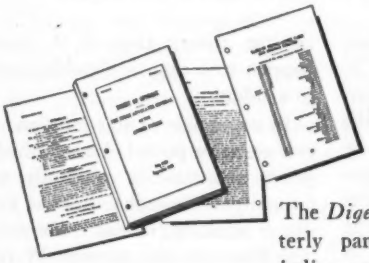
At the time of, or immediately after, the primary election, I made a res gestae statement (which might well have been a dying declaration had I not been successful at the polls) to the effect that there ought to be a law shortening this embryonic interlude, making it at least no longer than the period which nature has prescribed, on the theory that if it shouldn't happen to a dog, it shouldn't happen to a judge.

In the course of this long and difficult gestative period, during which the jittery appointee is constantly speculating upon the probabilities of flowering or aborting, he can make no definite plans or engagements, by reason of the uncertainty of his tenure. Thus, immediately following my appointment, I had to make the difficult decision of whether I should rent or purchase a judicial robe. After considering all angles, I played it safe by securing my gown on a conditional sales agreement, with the right of stoppage in transitu, and with a special clause, drawn by a good lawyer, giving me the option of returning the article in good order and condition, reasonable wear and tear and damage by voting machines excepted.

During the latter part of the period under discussion, my anxiety was somewhat alleviated by the endorsement of my candidacy by both the Republican and Democratic parties. I was endorsed under the Sitting Judge Principle that judges are non-partisan, par-

Answering Today's Need: Authori So

The Lawyers Co-operative Publishing Company announces the publication of four new sources for the latest Military Law.



I. DIGEST OF OPINIONS

The Judge Advocates General of the Armed Forces

The *Digest of Opinions* is issued in four quarterly pamphlets, with tables, citators, and indices cumulated in each.

It contains opinions of The Judge Advocates General concerning the rights, duties, and status of military personnel, civilian employees, and National Guardsmen and Reservists, the validity and construction of government contracts, and the validity of various claims against the government—such as claims under the Federal Tort Claims Act. It also includes decisions of state and federal courts and opinions of various governmental agencies affecting the military. Extracts from leading decisions of the U.S. Court of Military Appeals and Boards of Review in the Offices of The Judge Advocates General complete the *Digest*.

II. DIGEST OF OPINIONS — The Judge Advocates General of the Armed Forces (Bound Volume)

The annual bound volume completely consolidates the four quarterly digests each year, cumulating tables, citators, and indices.

LEADERS IN MODERN MILITARY LAW

ticularly on the eve of election. With respect to the major political parties, most jurists standing for election usually adopt the philosophy of Tim Dolan, who was on his deathbed and waiting for the Parish Priest to arrive and administer the last rites of the Church. When the good Father arrived, Tim admitted that his life had been far from exemplary, but he was assured that salvation was still possible if he would firmly renounce the devil and all his works and pomps. Upon hearing this, Tim shook his head and replied, "Father, in the shape I'm in, I can't afford to make enemies of anybody."

The deepest pangs of anguish experienced by a jurist during his embryonic period occur between the time he files his nominating petitions and primary election day. During this critical period, the judge's antenna is so delicately adjusted that it brings in the slightest and most unfounded rumors bearing on his candidacy. Usually, one group of friends warns him that he will be opposed by this lawyer and that lawyer, while another batch of well-wishers assures him that he will be unopposed, because of the fact that he is a good fellow, well liked and without a single enemy on the political horizon. If the said judge is not totally naive, he receives these latter assurances cum grano salis, because, however limited his political experience may have been, he takes judicial notice of the fact that, with the kind of friends you usually pick up in politics, you really don't need any enemies.

During this grub to butterfly period, the juristic neophyte is not permitted to sit peacefully in his chambers and calmly brood upon his chances of judicial fructification. On the contrary, he is required to get on the assembly line of his Court, and turn in a reasonable facsimile performance of a full-flowered judge. The transition or mutation from lawyer to judge is immediate; there is no stay of proceedings; there is no schooling period during which the judicial rookie is coached and given instruction in the difficult art of balancing the scales of justice. The ink is barely dry on his commission, when he finds himself sitting on the bench as though he were the reincarnation of Solomon, but feeling very much out of character. It is true of course, that some rookies attempt to warm up for the discharge of their judicial duties by sitting for a short period with another judge and observing how he handles the curves and fast balls the lawyers throw his way; but there seem to be two schools of thought on the question whether that is the best way to start a new judge on his career. In my own case, I had hardly uttered the words "I do" in response to my oath of office, when my President Judge handed me a gavel, a copy of the charge in Commonwealth v. Drum, and sent me into Quarter Sessions to try criminal cases. Fortunately for me, the district attorneys and defense counsel I encountered during my first few weeks on the bench were very understanding and patient.

They did not display toward me the unreasoning attitude of Sam Goldwyn, who, when producing a picture for MGM which called for two infants, sent this memo to the casting office: "Send me two babies—three weeks old—with experience."

As I sat on my first case—and they tell me I really sat on it—my mind went back a quarter of a century to the day when, as a young lawyer, I tried my first case on the other side of the rail. It was such a harrowing experience that I now look back on it with no damp-eyed nostalgia. I had only been at the bar a few months when my case—a civil action—came on for trial before a Judge whose name is immaterial—and, at the time, I thought he was also incompetent and irrelevant. He had mastered the art of making deep sounds from the chest seem like important messages from the brain; and he could put his mouth into high gear before his brain was turning over. I wouldn't go so far as to say that I disliked this Judge, but I always managed to keep my admiration for him under strict control. He wasn't a bad fellow by nature—he had become the way he was by hard and conscientious practice. In this case, I was for the plaintiff and this Judge was for the defendant—as it turned out. He certainly gave my witnesses a thorough going-over; they were examined and cross-examined; and it finally got so bad that I was about to suggest that His Honor ought to enter his appearance for the defendant. But, as I was new at the bar, I hesitated to protest. Not that the Judge and I didn't have words; we did, but I never had a chance to use mine. I will say this for him, however—he was consistent, in that he overruled all my objections and sustained all the objections of my opponent. But, in overruling mine, he always seemed to have the happy look of a top sergeant catching a rookie with a dirty rifle. I support he recognized that I was new at this sort of thing, because at one point in the trial he said, "How long have you been at the bar Counsellor?" and when I attempted to parry the question by replying, "Well, your Honor, I may not be the best lawyer at the bar," he sarcastically interjected, "You can be much more positive than that." Finally, the case was going against me so badly that I got up enough courage to rise and say, "Your Honor, this is my first case, and I don't mind you trying it; but please don't lose it for me." But lose it he did, and he would not take an appeal.

During my assignments in the criminal courts, I detected a tendency on the part of some Quarter Sessions practitioners to take things rather easy. Some of them do not seem to bother with such legal implements as lawbooks or briefs; and lawyers tell me that the success of the run-of-the-mine Q. S. lawyer depends, for the most part, on two things, to wit: (1) footwork, and (2) getting the fee in advance. Footwork, I am told, is a vernacular

term for that delicate maneuvering by which a lawyer manages to duck trial before a judge who is—shall we say—allergic to him. The second technique of getting the fee in advance appears to be fundamental in Quarter Sessions practice. They say that at all events the fee must be reduced to possession before trial, for, if the client is aquitted, he invariably attributes it to his own manifest innocence, and that, therefore, he had no need for a lawyer; but, if he is convicted, he ascribes it to the fact that he had a dumb lawyer —and, of course, in some instances, he may have something there. Quarter Sessions lawyers maintain that the real advantage of getting your fee in advance is that it relaxes you; you no longer have any personal worries; your interest in the case is then purely academic, and you can, therefore, take that calm and detached view of your client's predicament that is so essential for his proper defense.

On the civil side, the most difficult assignment I encountered during my apprenticeship period was a trial that lasted five days. The plaintiffs—two in number—were Chinese, neither of whom had abandoned to any great extent the language of their ancestors. We struggled through the first day without an interpreter; but the following morning we all decided that the case might have a longer run than Oklahoma if we didn't get some interpretative assistance for the Oriental litigants. It appeared, however, that none of the official court interpreters could handle Chinese, and while we were exploring the matter of securing a translationist for the plaintiffs, their attorney happened to remember that included in the entourage of his clients was a linguist who could solve our problem. However, counsel for the defendant intimated that the plaintiffs' interpreter might be slightly biased and that the translation might not come out according to Confucius. The matter was solved at the noon recess, when the defendant's attorney came back with his own interpreter. We then had two interpreters in the case—one stood at the witness stand translating, while the other stood guard and interpreted the interpreter. Whenever the translationists disagreed, we had a round table conference and eventually an agreement was reached on the translation through the democratic process of open translations openly arrived at. By the fourth day I was speaking broken English, and by the end of the trial I had developed a taste for chop suey and chow mein.

A new judge rather quickly learns that some of the occupational hazards of his profession can be alleviated by the practice of disposing of some of the litigation in which he becomes involved without the necessity of writing an opinion. It is said that many a judge was never reversed until he wrote an opinion. I once heard Judge Goodrich (United States Court of Appeals, Third Circuit) recommend the technique of Judge Bridlegoose, of Rabelaisian fame, who decided cases

by flipping a coin—heads for the plaintiff and tails for the defendant. Bridlegoose, J., defended this practice on the ground that, on the law of averages, he would be right fifty per cent of the time, which he asserted, was a high judicial average. Furthermore, he pointed out, this method of deciding cases dispensed with the irksome task of writing opinions, which he observed, were a superfluity to the winner and a source of aggravation to the loser.

Fortunately for the new jurist, the members of the Bar display toward him a spirit of tolerance and patience that helps him over some of the rough spots. I have always had a strong liking for lawyers, not only because they are members of my craft, but also because they are, by training, reasoning creatures and rather easy to live with. Your adversary who battles you in the legal arena during the day is your friend in the evening when the contest is over. Lawyers have been likened to a pair of shears—they do not cut one another but only that which is between them.

In concluding these obiter dicta remarks, I hereby extend an open invitation to all newly appointed judges of the Commonwealth to write and let me know how they are managing to secure unto themselves a reasonable degree of judicial aplomb.

In the meantime, I shall continue to mumble to myself, as I mount the bench, the prayer of the old South Carolina share-cropper, who always wound up his supplications with this moving appeal: "Oh, Lord, don't let nothin' come my way that You and me together can't handle."

Lawyers

"Lawyers are safe, sensible and trustworthy to deal with. They are accustomed to handling intricate problems and the more delicate the situation the more readily the lawyer, because of his experience, befits any case seeking to arrive at a solution of the difficulty." —*Cuff, J., in People ex rel Jacobs v. Worthing,* 167 NY Misc 702.

Reasonable Fee?

Prof. Michael of the Columbia Law School tells about the young lawyer who was uncertain as to the fee he should charge. Consequently, he visited a Senator who had been a great advocate in his younger days. After telling of the many difficulties in the case which necessitated long hours of research, and the millions of dollars involved in the disputed transaction, the recent law school graduate asked, "Under the circumstances, don't you think $5,000 is a reasonable fee?"

"Did you win the case?

"Oh . . . no," whispered the young lawyer.

"Well," mused the older man, "I think the case could have been lost for less."—*Columbia Law School News.*

Modern Jury Instructions

BY

HON. FRANK G. SWAIN

Judge, Superior Court, Los Angeles, California

Ladies and gentlemen of the jury:

The time now arrives to brighten your lives
By reading unending instructions;
Though it is a fiction that you heed my diction
When making juristic deductions.

A negligent act has this nub of fact
Your standard's the man who is prudent.
But do not ask me what his conduct should be;
Whatever you guess is concludent.

"The Proximate Cause" must now give us pause.
For this sing Fideles Adeste.
But you needn't fear, I'll make it all clear:
It's causa causans of res gestae.

You must not guess which defendants are rich
Or that they have heavy insurance.
Res ipsa today may mean power to pay;
Such fallacy tries one's endurance.

Your verdict must state what will compensate
For pain of a spinal compression.
Though wholly untrained in prices for pain,
All this lies in your sound discretion.

If you can agree, after these words from me,
I shall be surprised and delighted.
It's gambling, I know, like win, place or show,
But for this you can't be indicted.

Among the New Decisions

Ambulance — *injury to passenger.* The plaintiff in Hollander v. Smith & Smith, 10 NJ Super 82, 76 A2d 697, 21 ALR2d 902, was injured by a fall from a wheel stretcher being pushed in a hospital corridor by ambulance attendants, who had brought her there at the call of her physician. The belt attached to the stretcher to prevent patients from falling had not been buckled. The action was against the ambulance company and the attendants.

The trial court had excluded evidence of a custom in the hospital to fasten the belt when patients were being transported on stretchers. This ruling was held to be erroneous, and judgment for the defendant was reversed on this ground by the New Jersey Superior Court, Appellate Division, in an opinion by Bigelow, J.A.D.

Another interesting question was whether the case was a proper one for the application of the doctrine of res ipsa loquitur. It was held that the doctrine was inapplicable, since the fall might have been due to other causes than the attendants' negligence.

Another point of interest was the contention that the ambulance company was a common carrier. After some discussion and citation of numerous authorities, the court finally held that it was not.

The subject discussed in the appended annotation in 21 ALR2d 910 is "Liability of operator of ambulance service for personal injuries to person being transported."

Automobile Liability Insurers — *apportionment of debt.* Judgment creditors of an insured sought in Celina Mutual Casualty Co. v. Citizens Casualty Co., — Md —, 71 A2d 20, 21 ALR2d 605, to recover the amounts of the judgments from insurers under two policies of automobile liability insurance. One of the policies covered the judgment debtor as a named operator, and was procured to comply with the terms of the Financial Responsibility Law and thereby enable the insured to drive after revocation of his driver's license. The accident occurred while the judgment debtor was driving the car of a third person whose policy, by definition,

covered as "insured" any persons driving the specified car with the permission of the owner. Each policy contained the same limits of liability and also clauses for pro rata liability as to losses covered by other valid and collectible insurance.

Judgments against each insurer for one-half the total amount due were affirmed by the Court of Appeals of Maryland which, in an opinion by Chief Justice Marbury, held that neither insurance was primary or secondary, but that liability was concurrent and should be prorated between both insurers.

The appended annotation in 21 ALR2d 611 discusses "Apportionment of losses among automobile liability insurers under policies containing pro rata clauses."

Automobiles — *improper lights as gross negligence, etc., under guest statute.* The evidence in Cornelison v. Logan, 253 Ala 618, 46 So2d 215, 21 ALR2d 206, indicated that the plaintiff was a guest passenger who was being escorted to her home by the defendant in his truck-tractor on a dark night. The defendant's headlights were defective and had previously gone out twice the same night, but had "flickered" back on. The defendant admitted he had no view of the road ahead without lights, and he was not familiar with the road and did not know where the turn-off from the highway was located. He was driving thirty-five miles an hour or faster downgrade when his lights again went out but he continued to drive in the dark and attempted to make the turn into the highway without lights and applied no brakes until he realized that he was leaving the road. He collided with a telephone or light pole, ran into a building about forty feet from the road, and finally came to a stop. The plaintiff was seriously injured. Just before the accident the plaintiff had warned the defendant to watch for the turn-off to his right.

The Alabama Supreme Court, in an opinion by Justice Simpson, affirmed a verdict against the defendant, holding that the evidence was sufficient to show wanton conduct supporting a verdict for the guest plaintiff.

The appended annotation in 21 ALR2d 209 discusses "Driving motor vehicle without lights or with improper lights as gross negligence or the like warranting recovery by guest under guest statute or similar common-law rule."

Automobiles — *improper lights on moving vehicle.* Recovery of damages for personal injuries sustained in a head-on collision between an automobile in which plaintiff was a passenger and which was driven by her husband and a car driven by defendant was sought in Snook v. Long, 241 Iowa 665, 42 NW2d 76, 21 ALR2d 1. The collision occurred at night when the husband, failing to estimate correctly the distance to defendant's car approaching from the opposite direction, moved into the left lane in an attempt to pass a third car. The hus-

band claimed that he was lulled into such act by the defective lights on defendant's car, the testimony in regard to which was in sharp conflict. A statute prohibited the passing of another car on the left unless it could be done without interference with cars approaching from the opposite direction. Another statute prohibited driving at a speed greater than would permit stopping "within the assured clear distance ahead."

Judgment rendered on a verdict directed for the defendant was reversed by the Supreme Court of Iowa, in an opinion by Justice Hays, which held that the defendant, who was entitled to assume that anyone approaching from the opposite direction would observe the law, was not chargeable with a violation of the "assured clear distance" statute and that the court did not err in failing to submit that issue to the jury; but that the defendant, if guilty of negligence proximately producing the plaintiff's injury, would not be entitled to a directed verdict because the husband's negligence also operated proximately to produce the injury, and that, under the record, the question whether defendant's car had defective headlights and if so whether that was a proximate cause of the collision was a question for the jury.

The extensive appended annotation in 21 ALR2d 7 contains an exhaustive discussion of "Driving motor vehicle without lights or with improper lights as affecting liability for collision."

Automobiles — *improper lights on parked vehicle.* Recovery for damages to plaintiff's trailer-truck was sought in St. Johnsbury Trucking Co. v. Rollins, — Me —, 74 A2d 465, 21 ALR 2d 88, from one who had left his truck unlighted, when it was equipped with headlights in working condition, diagonally across the right-hand lane of, and partly facing, approaching automobiles, the vision of the drivers of which was somewhat obscured by darkness and falling snow. The driver of plaintiff's truck was able to stop in time to avoid a collision but, being confronted with an emergency wherein it did not immediately appear whether defendant's car, the lights of which had been suddenly switched on, was standing or traveling in the wrong lane, the plaintiff's driver turned so far to his right in attempting to avoid the collision that his wheels slipped off the shoulder of the road, which was concealed by drifting snow, and thereby overturned his vehicle.

Exceptions to a nonsuit ordered at the close of the evidence were sustained by the Supreme Judicial Court of Maine, in an opinion by Justice Merrill, which held that defendant's act in leaving his unlighted car across the road was a breach of duty to use due and reasonable care; that such negligence was not precluded from being the proximate cause of the damage by the fact that plaintiff's car was actually stopped before collision; that the driver of plaintiff's car, though faced with a

sudden emergency and possible impending collision, was required to exercise due care, the burden of proof as to which was upon the plaintiff; but that, under the circumstances above set forth the jury would have been justified in finding that defendant's negligence was the proximate cause of plaintiff's damage and that no negligence of plaintiff or his agent was a contributing proximate cause thereof; and that error was therefore committed in taking the case from the jury.

"Liability for collision on ground of absence or insufficiency of lights on parked or standing motor vehicle" is the subject of the extensive and exhaustive appended annotation in 21 ALR 2d 95.

Business Records as Evidence — *admissibility as affected by verification and authentication.* Recovery of the purchase price of hay alleged to have been delivered to the defendant-buyer was sought in Reinecke v. Mitchell, 54 NM 268, 221 P2d 563, 21 ALR2d 770, by the plaintiff-seller. The only question presented involved the admission in evidence of certain weight tickets purported to cover the hay delivered under each. By a Model Act for Proof of Business Transactions, it was provided that any writing or record, whether in the form of an entry in a book or otherwise, shall be admissible as evidence of the transaction it records, if it shall appear that it was made in the regular course of business and that it was the regular course of business to make such record at the

"You're hired! Now, about your qualifications for the job . . ."

time of the transaction or within a reasonable time thereafter.

Judgment for the plaintiff was affirmed by the Supreme Court of New Mexico which, in an opinion by Justice Sadler, held that the strict common-law principles as to verification and authenticity of commercial records for their admissibility in evidence were superseded by the Model Act which rendered the weight tickets admissible in evidence.

The "Verification and authentication of slips, tickets, bills, invoices, etc., made in regular course of business, under the Uniform Business Records as Evidence Act, or under similar 'Model Acts'" is discussed in the appended annotation in 21 ALR2d 773.

Corpse — *removal and reinterment.* Permission to remove his mother's body, which had lain in a mausoleum for a period of twenty years, to a nearby grave near that chosen by the petitioner for his burial was sought in Currier v. Woodlawn Cemetery, 300 NY 162, 90 NE2d 18, 21 ALR2d 465. It appeared that the mother's desire to be interred in the mausoleum was based on the expectation that her children, upon their decease, would be interred therein with her, but that such expectation would not be realized because of her son's preference for an earthy grave and her daughters' preference for burial near their homes in a distant state. The removal was approved by all the children and opposed only by the cemetery corporation. A statute authorized permission by the court upon refusal of the corporation's consent.

An order granting permission for removal was approved by the Court of Appeals of New York, in an opinion by Justice Fuld, which, persuaded that sound reason and laudable purpose, rather than whim or caprice, motivated the petitioner's purpose, held the determination in the court below not to exceed the bounds of permissible discretion.

The extensive appended annotation in 21 ALR2d 472, discusses "Removal and reinterment of remains."

Disinterment and Autopsy — *for evidential purposes in civil action.* In Kusky v. Laderbush, 96 NH 286, 74 A2d 546, 21 ALR2d 536, an action to recover damages resulting from an automobile accident, death of a passenger occurring eleven months after the accident, and his intervening disability, were claimed by the plaintiff to have resulted from the accident and by the defendant to have resulted from cancer.

Exception to the denial of defendant's motion for an order for an autopsy was sustained by the Supreme Court of New Hampshire which, in an opinion by Justice Lampron, held that the trial court had authority, in the exercise of a sound discretion, to order an autopsy, and that no evidence appeared in the record which could reasonably justify denial of an autopsy under proper safeguards.

The "Power of court to order disinterment and autopsy or examination

for evidential purposes in civil case" is the subject of the appended annotation in 21 ALR2d 538.

Divorce — *recrimination as defense.* A husband brought suit for divorce in Clark v. Clark, 54 NM 364, 225 P2d 147, 21 ALR2d 1263, on the ground of incompatibility. At the trial, the wife tendered and offered to prove that the plaintiff had committed repeated acts of adultery and that any incompatibility between the parties to the suit resulted "from the insistence of the plaintiff upon his pretended right to engage in extramarital adulteries" with the corespondent named. The trial court declined to receive the evidence and awarded an absolute divorce to the plaintiff.

The Supreme Court of New Mexico, in an opinion by Justice Sadler, held that the trial court erred in declining to receive the wife's evidence. It was held that the trial court should have received the proof of the adulteries so that he might exercise his discretion to determine whether, notwithstanding the incompatibility shown, the divorce should be denied.

The appended annotation in 21 ALR2d 1267 deals with "Recrimination as defense to divorce sought on ground of incompatibility."

Domicile in Divorce Action — *of member of armed forces.* In Hampshire v. Hampshire, 70 Idaho 522, 223 P2d 950, 21 ALR2d 1159, a divorce was sought by a husband, a member of the armed forces, in Idaho. It appeared that the parties had been married in New York, that the husband had separated from his wife and was living in Oregon at the time of his enlistment, that he was thereafter stationed in Washington, but was permitted to live off the base, and that he came to Idaho therefrom and intended, after his discharge, to take up his permanent residence there. A statute provided that a divorce should not be granted unless the plaintiff has been a resident of the state for six full weeks next preceding commencement of the action.

A decree granting the divorce was reversed by the Supreme Court of Idaho which, in an opinion by Justice Keeton, held that evidence that the plaintiff was a resident of Oregon at the time of his enlistment in the armed forces, that he was thereafter stationed in Washington, that he came to Idaho therefrom and stayed in a hotel and tourist cabin for three nights, that he received mail addressed to Idaho, that he bought a car license in Idaho, that he attempted to buy or rent property therein, and intended to take up his permanent residence there after his discharge, was insufficient to support the finding of a residence in Idaho. Notwithstanding denial of the divorce, an award for support of the child was adjudged proper and, in view of the income of the husband and the needs of the growing child, the amount of the award was raised from $25 to $50 per month.

The "Residence or domicile, for pur-

pose of divorce action, of one in armed forces" is discussed in the appended annotation in 21 ALR2d 1163.

False Arrest — *private citizen's liability for.* Damages for the arrest and detention of the plaintiff were sought in Gogue v. MacDonald, 35 Cal2d 482, 218 P2d 542, 21 ALR2d 639, against one who appeared before a public official and stated facts insufficient to support a criminal charge, but upon which a warrant for arrest was mistakenly issued. The complaint did not charge falsity of the facts reported, or malice or bad faith on the defendant's part, or any active part taken by him in the arrest.

A judgment dismissing the action upon sustaining a general demurrer to the complaint was affirmed by the Supreme Court of California, in banc, which, in an opinion by Presiding Justice Shenk, held that the defendant was not liable, under the allegations of the

"I move the answer be stricken from the record as not responsive, irrelevant and immaterial"

complaint, for either false imprisonment or malicious prosecution.

The extensive appended annotation in 21 ALR2d 643 contains an exhaustive discussion of "False imprisonment: liability of private citizen for false arrest by officer."

Federal Tort Claims Act — *time limits to action under.* Under the Federal Tort Claims Act, an administrator brought an action in Young v. United States, 87 App DC 145, 184 F2d 587, 21 ALR2d 1458, against the United States for the wrongful death of his intestate resulting from a fall in the District of Columbia. The action was filed after the limitation period for the District of Columbia had run but before the expiration of the time limit expressed in the Federal Tort Claims Act. The government contended that the District of Columbia statute of limitations was controlling and that the right to sue the United States did not survive the period of limitation contained in the statute creating that right. The District Court sustained this contention and dismissed the complaint for lack of jurisdiction over the subject matter.

The United States Court of Appeals, District of Columbia Circuit, in an opinion by Circuit Judge Fahy, reversed the judgment of the District Court and held that while the local law is to be followed with respect to the cause of action created, yet the Federal Tort Claims Act is controlling over the local statute with respect to the time prescribed for bringing the action.

The subject of the appended annotation in 21 ALR2d 1464 is "Statute of limitations applicable to action under Federal Tort Claims Act."

Habeas Corpus — *on restoration to sanity of one confined as incompetent.* Overholser v. Boddie, 87 App DC 186, 184 F2d 240, 21 ALR2d 999, was a habeas corpus proceeding brought by an inmate of a mental institution to prove his restoration to sanity and to secure his release. A commission on mental health had been established by a statute which provided, in addition to functions of the commission upon petition for inquiry into the mental condition of a person alleged to be insane, for utilization of the facilities of the commission upon application of a patient at large for a determination of restoration to sanity. The statute omitted any reference to the remedy of a confined patient and expressly provided that nothing therein contained shall deprive the alleged insane person of existing remedies to secure his release or prove his sanity.

An order for the immediate release of the petitioner, upon finding him to be of sound mind, was affirmed by the United States Court of Appeals, District of Columbia Circuit, in an opinion by Circuit Judge Wilbur K. Miller, which, overruling earlier decisions to the contrary, held that the power of the trial judge in the habeas corpus proceeding to release the applicant forthwith was not abrogated by the

statute so as to limit the court's power to ordering the original lunacy inquiry reopened for a new trial with participation of the commission.

"Habeas corpus on ground of restoration to sanity of one confined as an incompetent other than in connection with crime" is the subject of the appended annotation in 21 ALR2d 1004.

Jury — *separation of, in criminal case.* Upon objection of the defendant in Washington v. Amundsen, 37 Wash 2d 356, 223 P2d 1067, 21 ALR2d 1082, prosecution for indecent assault, the court struck out testimony of the father of the prosecutrix as to an admission by the defendant of lewd and lascivious conduct constituting another crime of which the defendant was not convicted. Subsequently the prosecutor attempted to elicit similar testimony from the mother of the prosecutrix, but voluntarily abandoned the same upon further objection of defendant. At the close of the case, the jury was instructed not to consider testimony struck out by the court. It also appeared that, after submission of the case to the jury, several jurors had been transported to a restaurant in charge of a deputy sheriff, not a bailiff.

Judgment entered upon a verdict of guilty, after denial of a motion for a new trial was reversed by the Supreme Court of Washington, Department 1, in an opinion by Justice Donworth, which held that the prejudice resulting from the conduct of the prosecutor in examining a second witness with respect to the inadmissible prior acts of misconduct was not averted by his subsequent abandonment of such inquiry, or by the general instruction of the court to the jury not to consider testimony stricken from the evidence. It was also presumed, in the absence of an attempted showing by the state to the contrary, that prejudice preventing a fair trial resulted from the separation of the jury, and that a new trial should have been granted on this ground.

The extensive appended annotation in 21 ALR2d 1088, entitled "Separation of jury in criminal case," supplements previous annotations on this subject.

Marketability of Title — *effect of condemnation proceedings.* The purchaser in a contract for the sale of realty, having elected to rescind before the date for performance because of an alleged objection to title, brought an action in Lansburgh v. Market Street Railway Co., 98 Cal App2d 426, 220 P2d 423, 21 ALR2d 785, for recovery of the deposit. The alleged defect consisted of municipal plans for condemnation of a part of the property for a street extension project. No service of summons commencing condemnation proceedings had been made at the time for performance of the contract, but a provisional map of the project was on record in the office of the Department of Public Works, and the results of a special election authorized a bonded debt for the project. No factual basis for rescission on the theory of frustration, failure of consideration,

mistake, or fraud was alleged or proved.

A judgment denying recovery was affirmed by the California District Court of Appeal, First District, Division 2, which, in an opinion by Presiding Justice Nourse, held that the condition of the title at the time fixed for performance determined the rights of the parties; and that the preliminary measures for condemnation which, unlike some other states, had no restrictive legal effect on the property owner, did not, as a matter of law, constitute a valid objection to the title.

"Condemnation, proceeding therefor, or prospect thereof, as affecting marketability of title" is discussed in the appended annotation in 21 ALR2d 792.

Oil or Minerals — *damages for trespass.* A county and its lessee were sought in Hughett v. Caldwell County, 313 Ky 85, 230 SW2d 92, 21 ALR2d 373, to be subjected to damages for the mining of fluorspar from the property of the plaintiffs. The property in question consisted of an abandoned roadway which was in actual possession of the defendants, and the title to which was found in litigation between the county and the plaintiffs to be in the former. Relying upon apparent acceptance of the adjudication by a delay of six months in superseding the judgment, the lessee conducted mining operations during such period. Subsequently the judgment was reversed and title was found to have reverted to plaintiffs, who were actively engaged

"The dirty so-and-so,—he didn't even contest my divorce!"

on adjoining land in mining operations which they contemplated extending to the strip herein involved.

A judgment charging the defendants, as innocent trespassers, with damages measured by the royalty usually prevailing in the vicinity, was reversed, with respect to the measure of damages, by the Court of Appeals of Kentucky which, in an opinion by Commissioner Stanley, deciding the issue as to the wilful or innocent nature of the trespass in favor of the defendants, held that the damages recoverable from trespassers innocently extracting and selling solid minerals are not in all cases to be measured by the customary royalty, which would operate to deprive the owner of profits realizable from the mining; that the question in each case is whether, under the circumstances, royalty or the net market value of the mined mineral is the just or due compensation; that the usual and customary royalty is the proper measure of damages where the owner cannot extract the minerals himself, or where he is merely holding his property for development in the unforeseeable future; but that, under the instant circumstances, the reasonable market value of the minerals after its mining, less the reasonable mining costs incurred by the defendants, is the proper measure of damages.

The appended annotation in 21 ALR 2d 380 discusses "Right of trespasser to credit for expenditures in producing, as against his liability for value of, oil or minerals."

Release — *avoidance of.* Sainsbury v. Pennsylvania Greyhound Lines, 183 F2d 548, 21 ALR2d 266, was an action seeking recovery of damages for personal injuries sustained when defendant's bus, on which plaintiff was a passenger, ran off the road and struck an embankment. Relying on the misrepresentations by defendant's adjuster, whom plaintiff knew to be an attorney, that the free medical and hospital care and disability payments to which the plaintiff was entitled as a member of the United States Navy would restrict the amount of his recovery from the defendant to damages for pain and suffering, plaintiff executed a release for which he was given a check for $500. Before commencement of the action plaintiff returned the check without indorsement, but defendant refused to accept it.

Judgment for the defendant upon trial without a jury was reversed by the Fourth Circuit, in an opinion by Circuit Judge Dobie, which held that the misrepresentations of law constituted sufficient ground for avoidance of the release, and that such relief was not precluded because the falsity of the representations could have been ascertained by reasonable inquiry, or because the plaintiff knew that the lawyer represented an antagonistic interest. Moreover, cashing of the check by plaintiff's attorney after the trial court's filing of an opinion in defendant's favor, without express or implied authority from the plaintiff who was absent on naval service was

held insufficient for dismissal of the appeal.

"Avoidance of release of claim for personal injuries on ground of misrepresentation as to matters of law by tortfeasor or his representative insurer" is the subject of the appended annotation in 21 ALR2d 272.

Remand to State Court — *appeal of denial of.* Lewis v. E. I. Du Pont De Nemours & Co., 183 F2d 29, 21 ALR2d 757, was an action to recover damages for personal injuries which was begun in a state court and removed therefrom by one of the defendants to a United States District Court on the ground of diversity of citizenship. An appeal from denial of a motion to remand the case to the state court was dismissed by the Fifth Circuit, which, in an opinion by Circuit Judge Holmes, held that the jurisdiction granted it by statute was confined to a review of final decisions and certain designated interlocutory orders, and that denial of a motion to remand the case could only be considered as ancillary to an appeal from an entry of judgment or dismissal of the action.

The title of the appended annotation in 21 ALR2d 760 is "Appealability of federal district court order denying motion to remand cause to state court."

Sales Tax — *exemption of newspapers, etc.* The statute involved in Gasson v. Gay, — Fla —, 49 So2d 525, 21 ALR2d 412, which levied a sales tax upon enumerated articles, exempted "newspapers" therefrom. The state comptroller, under his statutory rule-making power in administration of the act, elaborated on the meaning of "newspapers." The plaintiff, owner and operator of a newsstand, sought by the instant bill of complaint against the state comptroller a declaratory decree that certain magazines sold by him were included within the exemption.

A decree dismissing the bill of complaint was affirmed by the Supreme Court of Florida, in an opinion by Justice Chapman, which held that the comptroller's rule should not be interpreted as to extend the statutory exemption; that, under the statute, the exemption was intentionally granted to newspapers and withheld from magazines and periodicals; and that such classification was reasonable and not in conflict with the state or federal constitution.

The appended annotation in 21 ALR2d 415 discusses "What constitute newspapers, magazines, or periodicals, within provision of sales tax law exempting such items or commodities."

Service by Publication — *sufficiency of affidavit.* In Parker v. Ross, — Utah —, 217 P2d 373, 21 ALR2d 919, judgment by default for the plaintiff in a suit brought by a tax titleholder to quiet title as against the record titleholder and "all other persons unknown" claiming an interest in the property was sought to be set aside by the administratrix of the estate of the record titleholder. Service of process by publication in the suit to quiet title was based on an affidavit reciting,

among other circumstances, that the sheriff had returned a summons unserved because of his inability to find the named defendant in the state, that searches of telephone and city directories were fruitless, and that searches of the records of the county recorder, county treasurer, and county clerk disclosed two last known addresses of the defendant in another state, but that no reply to letters addressed thereto was received. Copies of the summons and complaint were sent to such addresses. The prior death of the named defendant, which was unknown to the tax titleholder, would have been disclosed by a search of the records of the board of health of the foreign state.

A judgment dismissing the complaint was affirmed by the Supreme Court of Utah which, in an opinion by Justice Wade, held that due diligence to learn the whereabouts of the named defendant was shown by the affidavit in support of service by publication; that the unsuccessful results of the searches warranted the designation, pursuant to statutory authorization, of "all other persons unknown" as parties defendant; that the heirs at law of the named defendant were included among those so made parties defendant; and that the service of process by publication was effective as against the heirs.

The extensive appended annotation in 21 ALR2d 929 discusses "Sufficiency of affidavit as to due diligence in at-

"She dresses that way so Mr. Burton won't notice she can't write shorthand."

tempting to learn whereabouts of party to litigation, for the purpose of obtaining service by publication."

Taxes — *effect of officer's certificate or error.* Vacation of a tax sale and cancelation of the clerk's deed were sought in Schuman v. Person, 216 Ark 732, 227 SW2d 160, 21 ALR2d 1269, before confirmation of the sale, on the ground that a bona fide attempt to pay the taxes had been frustrated by the mistake or oversight of the collector.

A decree holding the tax sale void and canceling the clerk's deed was affirmed by the Supreme Court of Arkansas, in an opinion by Justice Millwee, which held that the court's findings and decree were supported by the evidence that landowner, a person not well versed in business transactions, handed separate statements of taxes on two lots for $8.33 and $1.47 with sufficient money to pay both to collector who failed to take out the $1.47, and that landowner failed to count the change or ascertain that both lots were not covered by the receipt until after a tax sale and deed were made.

The appended annotation in 21 ALR2d 1273 discusses the "Effect of certificate, statement (or refusal thereof), or error by tax collector or other public officer regarding unpaid taxes or assessments against specific property."

Testamentary Intent — *evidence as to.* A holographic instrument containing language of testamentary disposition of property was offered in Estate of Ruby Sargavak, 35 Cal2d 93, 216 P2d 850, 21 ALR2d 307, by one of the beneficiaries named therein for admission to probate as a codicil to a will. The opponents, the beneficiaries named in the original will, offered extrinsic evidence consisting principally of oral declarations of the testatrix made at, before, and after the execution of the holographic instrument to show an absence of testamentary intent. The extrinsic evidence tended to show the holographic instrument to have been executed as a result of a quarrel between the testatrix and her deceased husband's niece who was living with her, but who was not mentioned in the original will, and an intention of the testatrix to give the beneficiaries named in the holographic instrument a power of attorney over her property for the purpose of ejection of the niece. Evidence to the contrary, in addition to the testamentary language of the holographic instrument itself, showed the beneficiaries named therein to have been long-time friends and advisers of the testatrix and her husband and natural objects of her benefaction.

An order admitting the holographic instrument to probate was affirmed by the Supreme Court of California, in banc, which held that the extrinsic evidence was properly admitted on the issue whether the holographic instrument was executed with testamentary intent, regardless of the language of such instrument; but that such evidence merely created a conflict with

evidence supporting the trial court's finding and was not so persuasive and unequivocal as to compel the conclusion that decedent did not intend by the holographic instrument to make a testamentary disposition of her property.

The "Admissibility of extrinsic evidence upon issue of testamentary intent" is the subject of discussion in the appended annotation in 21 ALR2d 319.

Trusts — *condition of right to contest validity.* To the bill of complaint in Barnett National Bank v. Murrey, — Fla —, 49 So2d 535, 21 ALR2d 1452, to set aside an inter vivos trust instrument on the ground of mental incapacity of the trust creator, brought by one who was a beneficiary under the trust but who was bequeathed a larger interest under a will, the defendants filed an answer containing an allegation relating to the failure of the plaintiff to renounce his beneficial interest under the trust.

An order striking the above portion of the answer was quashed by the Supreme Court of Florida, in banc, in an opinion by Justice Sebring, which held that before the beneficiary could contest the trust agreement he must renounce his interest by some means sufficient in law to operate as a divestiture pending outcome of the litigation which, if unsuccessful, would not preclude him from taking under the trust instrument.

The appended annotation in 21 ALR2d 1457 discusses "Renunciation of beneficial interest under inter vivos trust as condition of right to contest its validity."

Unemployment Benefits — *as affected by allowance under Federal Servicemen's Readjustment Act.* Two ex-servicemen receiving subsistence allowances under the Servicemen's Readjustment Act of 1944 (38 USC § 744) while attending school applied for benefits under the Connecticut Unemployment Compensation Statute. That statute made ineligible for benefits anyone "receiving any unemployment allowance or compensation granted by the United States . . . to ex-servicemen." The state statute had been enacted prior to the enactment of the Servicemen's Readjustment Act.

In Hannan v. Administrator, Unemployment Compensation Act, 137 Conn 240, 75 A2d 483, 21 ALR2d 1068, the Connecticut Supreme Court of Errors, pointing out that the obvious intent in both enactments was to avoid duplication of benefits, held in an opinion by Justice Baldwin, that the servicemen were not entitled to the state unemployment benefits in addition to their federal subsistence allowance.

The subject discussed in the appended annotation in 21 ALR2d 1072 is "Effect on right to unemployment compensation benefits of receipt of subsistence allowance under Federal Servicemen's Readjustment Act."

Vacation of Judgment or Grant of New Trial — *on condition of pay-*

ment of attorney's fees. In Vitullo v. Ambrosino, — RI —, 73 A2d 764, 21 ALR2d 861, a proceeding for vacation of a judgment by default in appearance at the trial of an action of assumpsit, it appeared that the defendant's husband had been acting as her attorney with the permission of the court, that the husband knew and assented to the assignment of the case for trial, and that the defendant failed to appear at the trial on the assumption that the case could not be tried without written notification of its assignment. No affidavit or allegation of facts to support the conclusion that defendant had a good defense to the action was filed with the motion.

Exception to the imposition of a condition to vacation of the judgment, that defendant pay counsel fees of a specified amount to plaintiff's attorney, was overruled by the Supreme Court of Rhode Island which, in an opinion by Chief Justice Flynn, held that, in the circumstances, there was no abuse of discretion or error of law.

The appended annotation in 21 ALR2d 863 discusses "Conditioning the setting aside of judgment or grant of new trial on payment of opposing attorney's fees."

Voluntary Dismissal — *terms and conditions.* Bolten v. General Motors Corp., 180 F2d 379, 21 ALR2d 623, an action to recover damages for personal injuries, was brought in a federal District Court in Illinois. The defendant filed an answer to the complaint and a motion for summary judgment

"Are you still grumbling about the extra day in Leap Year?"

based on expiration of the Illinois statute of limitations period. In order to bring an action in a federal District Court in Missouri, where the accident occurred and where maintenance of the action was not barred by the statute of limitations, the plaintiff filed a motion for an order permitting dismissal without prejudice under a rule of civil procedure providing that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."

An order sustaining defendant's motion for summary judgment and denying plaintiff's motion for leave to dismiss was reversed by the Seventh Circuit, which, in an opinion by Chief Justice Major, held that the plaintiff's absolute right to dismissal without prejudice was subjected by the rule only to the requirement that it be done upon order of the court and upon such terms and conditions as the court deems proper.

The subject of the appended annotation in 21 ALR2d 627 is "Construction, as to terms and conditions, of rule or statute providing for voluntary dismissal without prejudice upon such terms and conditions as court deems proper."

Will — *validation by codicil.* Contest of the will sought to be probated in Hurley v. Blankinship, 313 Ky 49, 229 SW2d 963, 21 ALR2d 817, was based on the grounds of incapacity, undue influence, and improper execution. At the time of the execution of the will, the testator was ninety-five years of age and lived with his son and daughter-in-law, who had the opportunity to exercise undue influence. The evidence, though conflicting, supported the conclusion that the testator was strong of will and sound of mind. The instruments offered for probate, which were found in an envelope in the testator's trunk after his death, consisted of an original will and four codicils, all of which were in the handwriting of the testator. The codicils which specifically referred to the original will were executed in due form but the original will was not subscribed by the testator as required by statute.

A judgment sustaining probate of the will and codicils was affirmed by the Court of Appeals of Kentucky, which, in an opinion by Justice Knight, held that the will, originally invalid, was validated by the codicils. Moreover, the findings of the jury against the contestants on the issues of mental incapacity and undue influence were upheld as justified by the evidence.

The subject of the appended annotation in 21 ALR2d 821 is "Codicil as validating will or codicil which was invalid or inoperative at time of its purported execution."

Wills — *incorporation of existing trust.* Contemporaneously with the execution of her will a testatrix executed a living trust agreement. This agreement reserved to her the income of the trust, the remaining income and

principal to be distributed at her death to designated beneficiaries. The trust was subject to amendment or modification by the testatrix during her lifetime. It covered both securities and cash, and named a bank as trustee. The residuary clause of the will, naming the same bank, gave all the residue to it, to be made part of and subject to the terms and conditions of the living trust. Montgomery v. Blankenship, 217 Ark 357, 230 SW2d 51, 21 ALR2d 212, was a suit by the heirs to determine the proper disposition of the securities and cash covered by the trust. Their contentions were (1) that the living trust was invalid, and (2) that it had not been incorporated into the will by reference.

The opinion of Justice Dunaway, of the Arkansas Supreme Court, passing over the question of the validity of the living trust, disposed of the case on the basis of the second contention. On this issue the court held that the living trust had been properly incorporated into the will by reference, and therefore was valid as a testamentary trust. The fact that the trust was subject to amendment and revocation was held not to preclude its incorporation by reference. Other objections to the incorporation by reference were likewise rejected.

The appended annotation in 21 ALR2d 220 discusses "Provision of will incorporating existing trust or making gift to the trustee as effective notwithstanding settlor's reservation of power to change or revoke."

How to Evade Cross-Examination

The lawsuit involved a landlady and her former tenants. The landlady was on the witness stand and opposing counsel was cross-examining her. Her own attorney objected to some of the questions put to her and opposing counsel appealed again and again to the court: "This is cross-examination, Your Honor, and I'm trying to show that the witness will not give 'Yes' or 'No' answers, but is evasive and just keeps on talking."

At one point the judge requested the witness to answer questions put to her and to "refresh your memory silently—don't talk out loud."

Suddenly the witness asked if she might "retire."

The judge said that she might, and still talking, she prepared to seat herself behind her attorney.

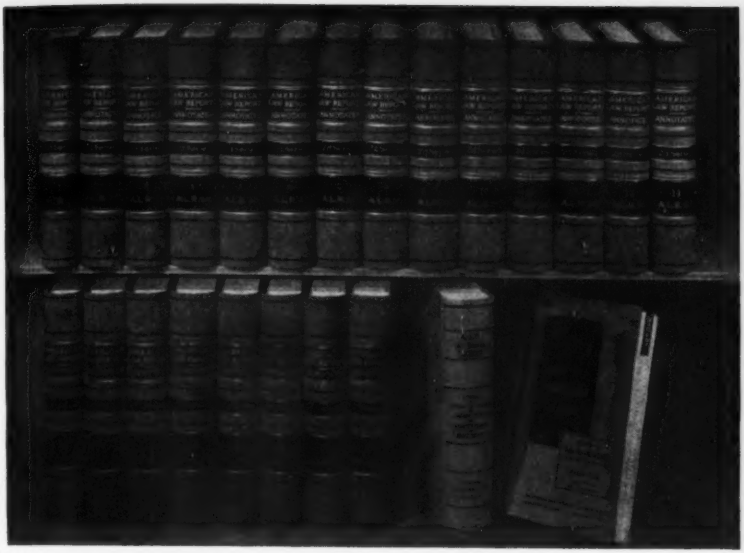
"Do you want to retire from the courtroom?" her lawyer asked.

"Why, no, but I will if you want me to," the landlady replied.

"Oh," said her attorney, "I thought you wanted to retire from the witness stand to go to the ladies' room."

"Oh, my, no!" the landlady said, "I just wanted to retire from the stand because I didn't like that other lawyer's questions."

She was called back to the stand and the case proceeded.—Contributed by Caruthers Ewing, of the Memphis, Tennessee Bar.



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